BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

In the Matter of: **Yarmouth Lumber, Inc.,** **Respondent.**	**Docket No. FMCSA-2006-25293**[1] **(Eastern Service Center)**

FINAL ORDER

1. Background

On April 19, 2006, Claimant, the Field Administrator for the Eastern Service Center, Federal Motor Carrier Safety Administration (FMCSA), issued a Notice of Claim to Respondent, Yarmouth Lumber, Inc., proposing a civil penalty of $7,360 for alleged violations of the Federal Motor Carrier Safety Regulations (FMCSRs). Specifically, the Notice of Claim, which was based on a March 22, 2006, compliance review (CR), charged Respondent with: (a) one violation of 49 CFR 382.303(a), with a proposed civil penalty of $3,680, for failing to conduct post accident alcohol testing for each surviving driver;[2] and (b) one violation of 49 CFR 382.303(b), with a proposed civil penalty of $3,680, for failing to conduct post accident controlled substances testing for each surviving driver as soon as practicable following an accident involving the loss of human

[1] The prior case number of this matter was ME-2006-0025-US0754.

[2] Claimant misstated the violation. Pursuant to 49 CFR 382.303(a), an employer motor carrier shall test for alcohol for each of its surviving drivers "as soon as practicable," following an accident. By omitting the phrase "as soon as practicable," Claimant's allegation indicated that a complete failure to conduct the alcohol test was a violation *per se*. Contrary to Claimant's charge, if a respondent can justify a failure to test by demonstrating that it was not practicable to conduct the test within the eight-hour window, the respondent would not be in violation of the regulation.

life.[3]

The material facts underlying the alleged violations are undisputed. On September 1, 2005, at approximately 3:30 a.m.,[4] John Smith, Respondent's driver, was involved in a fatal accident while stopped in a highway breakdown lane, in Mathuen, Massachusetts. Smith first notified Respondent of the accident at 5:45 a.m.[5] Smith contacted Respondent for the second time at 7:29 a.m., and was released from the state police investigation at between 7:30 a.m. and 7:40 a.m.[6] At about 7:40 a.m., Respondent instructed Smith to drive 86 miles to Bayside Employee Health in Portland, Maine, for the post-accident alcohol and controlled substances tests. Smith arrived at Bayside at 12:40 p.m., more than nine hours after the occurrence of the accident. According to Respondent, Smith had encountered some heavy traffic, and he was driving very slowly because he was "scared of being in another accident." In addition, he had to stop at

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[3] See Attachment A to "Field Administrator's Submission of Evidence Pursuant to 49 CFR 386.16(a) and Memorandum of Law in Support" (Claimant's Submission of Evidence).

[4] Although Respondent's Safety Director, Barry J. Marchand, contended in his written statement (Exhibit 11 to Claimant's Submission of Evidence) and handwritten notes (Exhibit 12 to Claimant's Submission of Evidence) that the accident occurred at 3 a.m., the driver, John Smith, maintained in an interview (Exhibit 10 to Claimant's Submission of Evidence) that the accident occurred at 3:30 a.m.; also Respondent stated in its Insurance Claim Form (Exhibit 6 to Claimant's Submission of Evidence) that the accident occurred at 3:30 a.m. Because the driver was a party in the accident, I am more convinced by his account. In any event, Smith was tested at 12:51 p.m., which was more than nine hours after either 3 a.m. or 3:30 a.m. Thus, this discrepancy is not material to the merits of the case.

[5] See Exhibit 11 to Claimant's Submission of Evidence.

[6] The FMCSA inspector who conducted the Compliance Review on Respondent stated that Smith was released from the police investigation "at approximately at [sic] or before 7:30 a.m." (Attachment F to Claimant's Submission of Evidence). Respondent maintained that Smith was released from the investigation at 7:40 a.m. (Exhibit 11 to Claimant's Submission of Evidence). For the same reason mentioned in footnote 4, this discrepancy is not material to the merits of the case.

Hampton, New Hampshire, because he was "mentally and physically sick."[7] No post-accident alcohol test was administered on Smith because it was over the eight-hour window.[8] The post-accident controlled substances test was administered on Smith at 12:51 p.m.[9] Respondent admitted that on September 1, 2005, it did not attempt to contact its alcohol and controlled substances Consortium, ChoicePoint.[10] Claimant contended that ChoicePoint had a 24-hour open line for its clients to arrange post-accident testing, and ChoicePoint had two testing locations available within approximately two miles from the accident scene, both of which were open at 7 a.m. on September 1, 2005.[11] Respondent did not dispute these contentions.

On May 2, 2006, Respondent replied to the Notice of Claim, denying each of the charges and requesting the submission of written evidence without a hearing, pursuant to 49 CFR 386.16(a).[12] Respondent's representative, Barry J. Marchand, argued that, as the company's Safety Director, he made the correct judgment in accordance with "common sense, logic and training," as well as his fifteen years' experience as a Safety Director, to request Mr. Smith to drive back to Portland, Maine, for the post-accident tests.[13] Respondent purported that the following grounds justified its decision to administer the tests in Maine: the possible delay in finding the ChoicePoint's nearby locations through heavy morning traffic; concerns over Smith's mental state that was unsuitable for taking a test in an unfamiliar testing site; ChoicePoint's lag time in arranging the tests; and the

[7] Attachment B to Claimant's Submission of Evidence.
[8] Exhibit 11 to Claimant's Submission of Evidence.
[9] *Id.*
[10] *Id*
[11] See Exhibit 1 to Claimant's Submission of Evidence.
[12] See Attachment B to Claimant's Submission of Evidence.
[13] *Id.*, at 2.

possible waiting time and chain of custody problems in ChoicePoint's nearby testing sites. Respondent further contended that it was advised by a consultant during a prior training seminar that if it was within the testing time window, it would be better to bring the driver back to Maine for the post-accident tests. Finally, Respondent provided a report of a "test" conducted by Respondent on March 23, 2006, more than six months following the accident, contending that if it had contacted ChoicePoint, it would have taken approximately 55 minutes for ChoicePoint to provide a testing location and time slot for a post-accident testing request.[14] Thus, Respondent concluded that it had met the "as soon as practicable" requirement under section 382.303.

On August 11, 2006, Claimant submitted his evidence. Claimant averred that Respondent was charged with the responsibility of knowing and complying with applicable regulations; thus, Respondent may not shift its burden by arguing that it had relied on a consultant's recommendations. Furthermore, Claimant dismissed each of the grounds that Respondent provided in justifying its decision, and contended that "common sense, logic and training" as well as its Safety Director's "experience in finding a post accident site before they are open" did not justify Respondent's decision of not contacting its consortium and instead directing Mr. Smith to a "known testing site" 86 miles away.

Specifically, Claimant pointed out that had Respondent even attempted to contact ChoicePoint, it would have discovered two testing facilities approximately two miles from the driver. As to the potential delay from driving to the nearby testing site in rush hour traffic, Claimant maintained that the amount of traffic delay involved in driving to

[14] *Id*, at 6.

the site 86 miles away in Maine could have been worse than what would have been involved in the two-mile trip to the nearby site. As to the argument that the driver's mental state was unfit for taking the tests in an unfamiliar location, Claimant argued that given the driver's mental and physical conditions, it was even more unsuitable for him to drive 86 miles back to Maine for the tests, particularly in light of 49 CFR 392.3, which prohibited Respondent from using a driver to operate the motor vehicle when it was known to Respondent that the driver's ability to operate the motor vehicle safely was, or would likely be, impaired. As to the potential delay from waiting for the test at the nearby site, Claimant averred that it was pure speculation because Respondent did not make any attempt to locate a testing facility nearby.

Finally, Claimant argued that the "test" conducted by Respondent in fact supported the alleged violations. The result of the "test" suggested that if Respondent had contacted its consortium and requested that the tests be done in the nearby location, it could have made the arrangement within 55 minutes; comparing that with the estimated two hours needed to drive back to Maine under optimal conditions, Respondent's decision would still not have been in compliance with the "as soon as practicable" requirement. Thus, Claimant concluded that Respondent did not demonstrate any extraordinary situation that would have rendered the tests at the nearby location impracticable.

2. Discussion

(a) Claimant's burden and the standard of evidence

From the language in section 382.303, it is clear that there is no intent to impose a strict liability standard on an employer carrier to administer post-accident alcohol and

controlled substances testing. The employer's responsibility, instead, is to make reasonable effort to administer the testing "as soon as practicable."[15]

Under section 382.303(d), if the alcohol test cannot be administered within 8 hours post-accident, or the controlled substances test cannot be administered within 32 hours post-accident, the employer shall abandon the effort in seeking the administration of the testing, and prepare a report stating the reasons that the tests were not promptly administered. With subsection (d) following the "as soon as practicable" language under subsection (a) and (b), the rule intended to hold an employer liable only if the claimant can demonstrate that the employer's failure to test was not caused by an objective impracticability of administering the tests. Respondent is not in violation *per se* if it fails to administer the required post-accident tests within the designated timeframe; Claimant must prove the failure was caused by Respondent's negligence.

Moreover, Respondent is not in compliance *per se* if it administers the required tests within the timeframe; if Claimant can prove that the tests could have been conducted practicably at an earlier time post-accident, Respondent would still be in violation. Claimant bears the burden of proof to show, by a preponderance of the evidence, that Respondent was negligent in failing to seek the administration of the post-accident testing at an earliest practicable time.[16] To establish by a preponderance of the evidence means that something is more likely so than not.[17]

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[15] See 49 CFR 382.202.
[16] See *In the Matter of RCS Intermodal Transportation, Inc.*, FMCSA-2003-16793, Final Order, June 30, 2006, at 4, stating "[t]he burden of proof is on Claimant to show, by a preponderance of the evidence, that Respondent was *negligent* because its driver was not post-accident tested for alcohol as required by 49 CFR 382.303(a)." (emphasis added).
[17] *Id.*, at 4.

(b) Claimant has met his burden of proof.

The word "practicable" means "capable of being put into practice or of being done or accomplished."[18] In *In the Matter of RCS Intermodal,* it was held that Respondent was not negligent because the driver ignored the instructions provided by Respondent to report the accident; therefore, Respondent was not *capable* of testing the driver in a timely manner.[19] Under the same theory, Claimant met his burden of proof in the instant matter, because Claimant has demonstrated that Respondent was capable of administering the post-accident alcohol test within the eight-hour window, and administering the post-accident controlled substances test much sooner than 9 hours after the accident.

Respondent's history of violations regarding post-accident testing established that it was fully aware of its obligation under section 382.303.[20] While it was unfortunate that Respondent received some misleading information from the consultant, Respondent was "expected to exercise due diligence in determining the applicability of Federal Safety regulations to [its] operations and the steps [it] must take to comply with those regulations."[21] Respondent may not shift its responsibility simply because it was misinformed by a third party, such as a consultant.

As Claimant's evidence demonstrated, Respondent was notified of the accident at

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[18] *Id.,* at footnote 14, citing *Marriam-Webster online Dictionary.*
[19] *Id.,* at footnote 14.
[20] See Attachment F, paragraph 3, to Claimant's Submission of Evidence, demonstrating that violations of section 382.303 were discovered during both a 1999 Compliance Review and a 2004 Compliance Review. The alleged violations from the 2004 review also led to an enforcement action. The parties settled the case, in which Respondent admitted the violations.
[21] See *In the Matter of American Truck & Trailer Repair,* Docket No. FHWA-1994-5276, Final Order, June 24, 1994, at 2-3.

5:45 a.m. Respondent could have started to make contact with its consortium then. Even if Respondent delayed the contact because the driver was still held by the state police and it was not sure when the driver would be available for the testing, Respondent should have called the consortium to establish an appointment for the testing after the driver was released from the police investigation. Yet no attempt was made.

Respondent averred that its "test" conducted on March 23, 2006, showed the significant lag time for ChoicePoint to set up an appointment for the testing. Claimant correctly rejoined, however, that, even with the 55 minutes lag time in getting an appointment, the driver would have been tested sooner at the nearby location than taking the projected two-hour drive back to the Maine location. Therefore, even if the driver had driven at a normal highway speed without stopping, Respondent's decision would not have resulted in a test being performed as soon as practicable following the accident.

Respondent argued that its decision was based on the alleged experience of Mr. Marchand as a Safety Director. According to Respondent, it was for the best interest of the driver to be tested in a "familiar location," even if it would involve an 86-mile trip on the highway. Claimant is correct that this argument was without merit. Experience in the transportation industry should have told Respondent that after a fatal traffic accident, the most frightening thing for a traumatized driver is to continue to drive a vehicle on the highway rather than being tested in an unfamiliar location. The fact that the driver was unable to continue the journey at a normal highway speed because he was afraid of driving demonstrates that point.

Respondent also contended that if the driver were directed to the location provided by the consortium, he would have had to fight over the morning rush-hour

traffic and experience significant delay. Experience in the transportation industry should have told Respondent that if his driver would have encountered traffic delay during a two-mile trip, he would likely have encountered delay in an 86-mile trip as well.

Accordingly, Claimant has established by a preponderance of the evidence that Respondent was negligent in failing to have its driver tested "as soon as practicable." Claimant's evidence shows that under the circumstances, it was practical and possible for Respondent to test its driver in a location that would have been provided by its consortium, which was closer to the accident scene. Respondent did not meet the requirements of the regulations. Thus, Claimant has met its burden of proof in establishing the violations.

(c) Civil penalty

In determining the amount of civil penalty, FMCSA is required to "tak[e] into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice and public safety may require. hi each case, the assessment shall be calculated to induce further compliance."[22] Claimant used the Uniform Fine Assessment (UFA) program to calculate Respondent's civil penalty.[23] It was properly calculated, and Respondent did not contest the proposed penalty in its Reply.

THEREFORE, *It Is Hereby Ordered That* Respondent pay to the Field Administrator for the Eastern Service Center, within 30 days of the service date of this Final Order, a total civil penalty of $7,360 for two violations of FMCSRs. Payment may

[22] 49 U.S.C. § 521(b)(2)(C).
[23] Attachment C to Claimant's Submission of Evidence.

be made electronically through the FMCSA's registration site at http://safer.fmcsa.dot.gov by selecting "Online Fine Payment" under the "FMCSA Services" category. In the alternative, payment by cashier's check, certified check, or money order should be remitted to the Field Administrator at the address shown in the Certificate of Service.[24]

Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

6-10-09
Date

[24] Pursuant to 49 CFR 386.64, a petition for reconsideration may be submitted within 30 days of the issuance of this Final Order.

CERTIFICATE OF SERVICE

This is to certify that on this 11 day of June, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

William Phipps, President Yarmouth Lumber, Inc. 384 Portland Road Gray, ME 04039	One Copy U.S. Mail
Barry J. Marchand c/o Yarmouth Lumber, Inc. 384 Portland Road Gray, ME 04039	One Copy U.S. Mail
Nancy Jackson, Esq. Trial Attorney Office of Chief Counsel (MC-CCE) Federal Motor Carrier Safety Administration 12600 West Colfax Avenue, Suite B-300 Lakewood, CO 80215	One Copy U.S. Mail
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